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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

MAY 30 1996

In the Matter of	)	
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Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
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To: The Commission

REPLY COMMENTS OF THE NATIONAL LEAGUE OF CITIES AND THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS

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May 30, 1996

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SUMMARY

The National League of Cities and the National Association of Telecommunications Officers and Advisors submit these reply comments in response, and opposition, to the comments of some cable industry commenters that improperly seek to entice the Commission into using this proceeding to adopt rules based on Sections 253 and 303 of the 1996 Act. The Commission should roundly reject the cable commenters' invitations for several reasons.

As an initial matter, the Section 253 and 303 issues raised by the operators are beyond the scope of the NPRM. As a result, interested parties have not been provided sufficient notice and opportunity to comment on any proposed rules concerning Sections 253 and 303. In any event, the cable industry's position is directly contrary to the language and legislative history of Section 253 and 303.

Section 253(c) creates a safe harbor for non-discriminatory state and local requirements relating to local right-of-way management and compensation. The preemption power given the FCC by Section 253(d) reaches only Section 253(a) and (b), and does not reach any dispute under Section 253(c). The exclusion of Section 253(c) from the reach of Section 253(d) was not accidental: The legislative history of the Gorton amendment that resulted in paragraph (d) makes plain Congress' intent that the FCC was to have no authority to resolve disputes concerning right-of-way management

and compensation arising under Section 253(c); Congress intended those disputes to be resolved exclusively by the courts.

In improperly inviting the Commission to adopt generic rules under Section 253(d), cable commenters also ignore the plain language of that section, which contemplates case-by-case resolution of individual disputes concerning a particular state and local requirement under Section 253(a) and (b). Because state and local requirements that may be subject to dispute under Section 253(a) and (b) will inherently be fact-specific, the FCC cannot make generalized rules about such inherently variable circumstances -- and certainly has no record enabling it to do so here.

Finally, cable commenters completely misread Section 303. The restrictions placed on cable franchising authorities by Section 303 are explicitly limited to franchises "under this Title," i.e., Title VI, the Cable Act. This phrase was added at the Conference, along with Conference Report language making clear that its purpose was to prevent Section 303 from being read the way cable commenters now urge. The Conference Report makes plain that Section 303 places no constraint on a local government's ability to manage and obtain compensation for a cable operator's use of local rights-of-way to provide telecommunications services through any non-Title VI mechanism -- whether through a separate non-Title VI franchise or otherwise -- as long as such compensation and management is non-discriminatory and competitively neutral.

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To: The Commission

The National League of Cities and the National Association of Telecommunications Officers and Advisors, by their attorneys, hereby file the following reply to the opening comments and the Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding, released April 19, 1996. These reply comments respond to arguments raised by certain cable industry commenters concerning local rights-of-way, as well as ¶¶ 22 and 220-225 of the NPRM, addressing access to rights-of-way.

I. ADOPTING RULES CONCERNING SECTION 253(d) AND SECTION 303 IS BEYOND THE SCOPE OF THIS PROCEEDING AND OF THE NOTICE IN THE NPRM.

The portion of the NPRM dealing with access to rights-of-way addresses the statutory requirements of §§ 224 and 251(b)(4). On their face, those statutory requirements apply to local exchange

carriers ("LECs"), not to local governments. Some cable industry commenters, however, have attempted to use this proceeding as a back-door opportunity to urge the Commission to make rules that would improperly intrude on the right-of-way compensation and management authority of local governments.[1] As a threshold matter, the Commission should not consider such comments. Aside from their substantive fallacies (discussed briefly below), such comments are out of place in this proceeding.

The NPRM did not solicit comments on § 253(d) or § 303. The closest it came to doing so was a somewhat obscure remark — in the Overview, not in the paragraphs soliciting comments — suggesting that "[t]he section 251 rules should help to give content and meaning to what state and local requirements the Commission 'shall preempt' as barriers to entry pursuant to section 253."[2] But the NPRM expressed no intent to make rules regarding right-of-way access under § 253 (for good reason, as discussed below). Comments urging the Commission to do so are thus beyond the scope of this proceeding and should be disregarded.

Because the NPRM fails to give sufficient notice of intent to adopt rules under §§ 253(d) and 303, the Commission could not in

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[1] Comments of Comcast Corporation at 12-15 (May 16, 1996), Comments of Cox Communications, Inc. at 55-59 (May 16, 1996), Comments of Tele-Communications, Inc. at 13-17 (May 16, 1996) (collectively, "Cable Interests").

[2] NPRM at ¶ 22.

any case make rules based on those provisions on the basis of the comments filed in this proceeding. The single casual reference to Section 253 in paragraph 22 of the NPRM cited above would not suffice to place interested parties on notice of any "proceeding" to adopt rules under Section 253 or 303. As a result, interested parties have had no real opportunity to comment on any such rules. Due process and procedural considerations would prevent the Commission from acting on a record as barren as that of this proceeding with respect to local government rights-of-way — even aside from the substantive problems identified below.[3]

II. SECTION 253(c) AND (d) DEPRIVE THE COMMISSION OF JURISDICTION OVER STATE AND LOCAL REQUIREMENTS RELATED TO MANAGEMENT OF OR COMPENSATION FOR THE USE OF THE PUBLIC RIGHTS-OF-WAY.

In pressing for generalized § 253(d) preemption rules, the Cable Interests urge an interpretation of Section 253 that is flatly inconsistent both with that Section's express terms and its legislative history. In fact, the Commission's authority under Section 253(d) does not extend to disputes arising under Section 253(c) concerning local right-of-way compensation or management. These are left to the courts.

Section 253(a) provides:

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[3] See, e.g., NLRB v. Wyman-Gordon Co., 394 U.S. 759 (1969); Florida Gas Transmission Co. v. FERC, 876 F.2d 42, 44-45 (5th Cir. 1989).

> [n]o State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service.

Sections 253(b) and (c) carve out two different "safe harbors" from Section 253(a). Subsection (b) exempts from the scope of subsection (a) state law requirements relating to universal service, public safety and welfare, and consumer protection:

> Nothing in this section shall affect the ability of a State to impose, on a competitively neutral basis and consistent with section 254, requirements necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers.

Subsection (c) creates an independent and separate safe harbor for state and local requirements concerning public rights-of-way:

> Nothing in this section affects the authority of a State or local government to manage the public rights-of-way or to require fair and reasonable compensation from telecommunications providers, on a competitively neutral and nondiscriminatory basis, for use of public rights-of-way on a nondiscriminatory basis, if the compensation required is publicly disclosed by such government.

The Commission's authority with respect to subsections (b) and (c), however, is entirely different. Section 253(d) authorizes the Commission to preempt state and local requirements that violate subsection (a) or (b) of that Section. Section 253(d), however, excludes subsection (c) from this preemptive authority. Thus, the Commission has no authority to preempt state or local requirements

relating to management of or compensation for the public rights-of-way. Those disputes are left to the courts, not the Commission.

Nothing in § 253, including subsections (a) and (d), affects the state and local government rights secured in subsection (c). Thus, before one can reach any question as to whether a state or local requirement might violate subsection (a), one must first determine whether such a state or local requirement falls within the scope of subsection (c). If so, subsection (a) is inapplicable to the requirement, and the Commission has no jurisdiction under subsection (d) to make a determination under subsection (c).

Nor does the Commission have jurisdiction to determine whether the requirements of Section 253(c) have been satisfied — for example, whether compensation charged by a municipality is "fair and reasonable" or whether right-of-way management or compensation requirements are exercised on a "competitively neutral and nondiscriminatory basis." The legislative history leaves no doubt that Congress intended that these decisions be left to the courts, not the Commission.

Subsection 253(d), the preemption provision, was added in Conference, based on Section 254 of the Senate Bill. The House provision did not contain any preemption provision at all.[4] Thus, the history of the provision must be found in the Senate bill, S.

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[4] H.R. CONF. REP. No. 458, 104th Cong., 2d Sess. 126-27 (1996).

652, rather than in the House. In the Senate, § 254(d), as originally proposed, contained a sweeping preemption provision that did not exclude subsection (c) from its coverage. After a proposed amendment to remove the preemption provision in subsection (d) entirely, and after substantial debate on the Senate floor, however, a compromise amendment, offered by Senator Gorton, was adopted to preserve state and local authority over management of and compensation for the public rights-of-way. The Gorton amendment, adopted by unanimous voice vote, revised subsection (d) to clarify that subsection (c) disputes would not be subject to FCC preemption authority under subsection (d).

Senator Gorton, the author of the successful compromise amendment, stated:

> There is no preemption . . . for subsection (c) which is entitled, "Local Government Authority," and which preserves to local governments control over their public right of way. It accepts the proposition from [Senators Feinstein and Kempthorne] that these local powers should be retained locally, that any challenge to them take place in the Federal district court in that locality and that the Federal Communications Commission not be able to preempt such actions.[5]

The intent of Congress to reject FCC preemptive authority over local right-of-way authority is further clarified by the Conference Report:

> The conference agreement adopts the House provision [under Section 601] stating that the bill does not have

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[5] 141 Cong. Rec. S 8213 (Daily Ed. July 13, 1995) (June 13, 1995) (remarks of Sen. Gorton) (emphasis added).

> any effect on any other Federal, State, or local law unless the bill expressly so provides. This provision prevents affected parties from asserting that the bill impliedly preempts other laws.[6]

Thus, the Commission's subsection (d) preemptive power can come into play only where subsection (c) does not apply, and the courts, not the Commission, must determine whether subsection (c) applies. Subsection (c) takes the Commission completely out of the business of regulating state and local right-of-way management and compensation. The Commission must therefore reject the Cable Interests' patently incorrect assertion that the language of § 253 somehow extends FCC preemptive authority into any matter related to subsection (c).

III. SECTION 253(d) REQUIRES CASE-BY-CASE DECISIONS AND IS INCOMPATIBLE WITH GENERAL PREEMPTION RULES.

The Cable Interests also ignore the language of § 253(d) itself, which expresses the mandate of Congress that the Commission exercise preemptive powers only "after notice and an opportunity for public comment." This language makes clear that § 253(d) is designed for case-by-case review of particular local requirements, not for generic rules.[7]

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[6] H.R. CONF. REP. No. 458, 104th Cong., 2d. Sess., 201 (1996).

[7] We support the opening Comments of Municipal Utilities (May 16, 1996) on this issue. See id. at 4-6.

Subsection 253(d) states: "If, after notice and an opportunity for public comment, the Commission determines that a State or local government has permitted or imposed . . ." (emphasis added). This language makes clear that the Commission must act only after public notice and comment on a particular local requirement already imposed by a state or local government. Rather than contemplating sweeping rules interpreting § 253(d), the statute requires the Commission to address individual state and local requirements on a case-by-case basis as they arise, and to rule on them individually after public comments.

This makes perfect sense: state and local requirements that may be subject to dispute under subsections (a) and (b) will vary considerably. The Commission cannot make generalized rules about such inherently variable circumstances -- particularly here, where there is no record whatsoever to provide meaningful guidance.

Thus, the Cable Interests have misread subsection (d). It does not authorize the Commission to make general preemption rules in this proceeding under § 253(d), in the absence of concrete facts and specific public comment.

IV. CABLE INTERESTS MISREAD SECTION 303, WHICH REFERS ONLY TO TITLE VI FRANCHISES AND PRESERVES LOCAL GOVERNMENTS' RIGHT TO OBTAIN FAIR AND REASONABLE COMPENSATION FROM CABLE OPERATOR PROVISION OF TELECOMMUNICATIONS SERVICES, WHETHER THROUGH SEPARATE NON-TITLE VI FRANCHISES OR OTHERWISE.

Some of the Cable Interests assert that Section 303 of the Act supports their claim that Congress intended preemption of local

right-of-way authority.[8] Much like the Cable Interests' Section 253 arguments, this assertion is directly contradicted by the language and legislative history of the provision. As an initial matter, we note that Section 303 is entirely beyond the scope of the NPRM; it solicits no comments on this provision at all.

In any event, the Cable Interests misrepresent the meaning of § 303. It is true, for example, that § 303 prohibits a franchising authority from "imposing any requirement under this title that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator . . . ."[9] But the Cable Interests inexplicably ignore the fact that § 303 only places limits on requirements imposed "under this title" -- in other words, Title VI, the Cable Act.

This means that, to the extent that a local government has independent authority under state and local law to franchise or to impose reasonable requirements on telecommunications right-of-way users -- whether they also happen to be cable operators are not -- Section 303 places no obstacle on a local government's ability to do so. Lest there be any doubt on this point, the Conference

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[8] Thus, TCI states that "Congress . . . expressly preempts LFAs from prohibiting, limiting, restricting, or conditioning franchisees' provision of telecommunications services." TCI comments at 15. See also Cox comments at 58-59.

[9] Section 303(a)(B) (emphasis added).

Report discussion of Section 303 removes it, making clear that cable operators wishing to provide telecommunications services are in no way immune from any local right-of-way requirements outside of Title VI:

> The conferees intend that, to the extent permissible under State and local law, telecommunications services, including those provided by a cable company, shall be subject to the authority of a local government to, in a non-discriminatory and competitively neutral way, manage its public rights-of-way and charge fair and reasonable fees.[10]

Thus, even if the Cable Interests were to succeed in shoehorning § 303 into the current proceeding, it would not help them.

V. CONCLUSION

The NPRM's reference to § 253 (much less § 303) in this proceeding is tangential at best. Thus, the key affected parties — local governments — did not submit initial comments in this rulemaking. The discussion above, however, makes clear that the Cable Interests' reading of those provisions is completely wrong. To the extent to which the Commission concludes that the issues raised by the Cable Interests are properly before it in this rulemaking, we hereby incorporate by reference the comments and

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[10] H.R. CONF. REP. NO. 458, 104th Cong. 2d. Sess., 180 (1996).

reply comments we filed (together with other local community interests) in the pending Open Video Systems proceeding.[11]

Respectfully submitted,

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May 30, 1996

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[11] Comments of the National League of Cities et al., Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46 (filed April 1, 1996); Reply Comments of the National League of Cities et al, Implementation of Section 302 of the Telecommunications Act of 1996, CS Docket No. 96-46 (filed April 11, 1996).